

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRIPAWAN SINGH, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.2922/AHD/2016

(निर्धारणवर्ष / Assessment Years: (2012-13)

(Virtual Court Hearing)

The DCIT, Circle-1(1)(2), Surat.	<b>Vs.</b>	M/s. Gandhi Capital Private Limited, Shop No. 5017, 5 <sup>th</sup> Floor, Jash Market, Ring Road, Sahara Darwaja, Surat-395002
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AABCG2903J</b>		
<b>(Assessee)</b>		<b>(Respondent)</b>

Assessee by : Shri Sapnesh Sheth, CA

Revenue by :Shri H. P. Meena, CIT(DR)

**सुनवाईकीतारीख/ Date of Hearing : 29/10/2021**

**घोषणाकीतारीख/Date of Pronouncement: 25/01/2022**

**आदेश / O R D E R**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by the Revenue, pertaining to Assessment Year (AY) 2012-13, is directed against the order passed by the Learned Commissioner of Income Tax (Appeals)-3, Surat [“the Id. CIT(A)” in short] in Appeal No. CAS-3/Tfrd-1/79/2015-16,dated 24.08.2016, which in turn arises out of an order passed by the Assessing Officer (assessing officer) under section143(3)of the Income Tax Act, 1961 [hereinafter referred to as the “Act”], dated 31.03.2015.

2. Grievances raised by the Revenue are as follows:

*“1. Whether on the fact and the circumstance of the case and in law, the Ld. CIT(A) was justified in deleting the addition made u/s 68 of the IT Act amounting to Rs.30,27,80,000/- without appreciating the fact that the assessee has failed to submit sufficient evidences to fulfill conditions laid down in section 68 of the IT Act i.e. Identity, genuineness and creditworthiness in respect of money received in its books of accounts.*

*2. Whether on the fact and the circumstance of the case and in law, the Ld CIT(A) was justified in deleting the addition made u/s 68 of the IT Act without appreciating the fact that the assessee has failed to produce the directors of the companies M/s Kuber Metals P. Ltd and M/s Sunny Wisdom Enterprise.*

*3. Whether on the fact and the circumstance of the case and in law, the Ld CIT(A) was justified in deleting the addition made u/s 68 of the IT Act without appreciating the fact that in case of investor company M/s Anushka Soft Tel Pvt Ltd, its director has accepted that the company is having no infrastructure, no regular source of income and no business and capacity of their shareholder is not proved.*

*4. On the facts and in the circumstances of the case, the Ld CIT(A) has ought to have upheld the order of the Assessing Officer.*

*5. It is, therefore, prayed that the order of the CIT(A) may be set aside and that of Assessing Officer may be restored to the above extent.”*

3.The relevant material facts, as culled out from the material on record, are as follows. Assessee before us is a Private Limited Company. The assessee company filed return of income in respect of assessment year 2012-13, declaring income of Rs.5,53,68,190/-, on 29.09.2012. The same was processed by accepting the returned income. Consequent to selection of the assessee's case for scrutiny, statutory notice under section 143(2) of the Income Tax Act, dated 12.08.2013 was issued to the assessee. A notice under 142(1) dated 03.07.2014 was issued calling for basic documents and details. In response to notice under section 142(1), the assessee filed details and documents, such as Balance Sheet, Profit and loss account, Bank statements, PAN Number, ROC details, name and address of share subscribing companies. The main source of income of the assessee for the assessment year is income from Business and Profession. Besides, the assessee has also shown income from other sources comprising interest income. The assessee is engaged in the business of manufacturing of POY, PFY etc. The turnover of the assessee- company for the assessment year 2012-13, is to the tune of Rs. 205.04 crores as against turnover of Rs. 72.59 crores for the preceding year. Various direct and indirect expenses as debited in the Profit and Loss Account have been claimed. The gross profit for the assessment year is Rs. 13.01 crores as against Rs. 2.35 crores for the preceding year. The net profit for the assessment year is Rs. 6.37 crores as against Rs.1.29 crores for the preceding year. The gross profit ratio for the assessment year is 6.35% as against 3.24% for the preceding year. The net profit ratio for the assessment year is 3.11% as against 1.78% for the preceding year. The gross profit ratio is observed to have

registered marginal increase from the earlier year while the net profit is observed to have registered marginal increase.

4. During the course of scrutiny assessment proceedings, assessing officer observed that assessee company had received substantial amount of share application money during the year under consideration towards share capital and share premium. The following table depicts a bird's eye view of the receipts by the assessee towards share capital and share premium.

Name of Investor	Address of Investor	No. of Shares	Face value per share	Premium Per Share	Total face value	Total Share Premium	Total Amount paid
KUBER METALS PVT LTD	12/372, RANITAL assessing officer MAIN ROAD, OPP. ANKUR APARTMENT, SURAT	29850	10	660	2,98,500	1,97,01,000	1,99,99,500
ANUSHKA SOFT-TEL PVT LTD	105, SAGAR SHOPPINGCENTRE, J P ROAD, ANDHERI(WEST), MUMBAI	284000	10	660	28,40,000	18,74,40,000	19,02,80,000
SUNNY WISDOM ENTERPRISE INC	RM 51, 5TH FLOOR, BRITANNIA HOUSE, JALAN CATOR, BANDARSERI, BEGAWAN BS, 8811, NEGARA, BRUNEI	250000	10	440	25,00,000	11,00,00,000	11,25,00,000

4. Therefore, Assessing Officer issued notice under section 142(1) of the Act, dated 15.01.2015, (vide assessing officer page 3) requiring the assessee to furnish the supporting material to establish the identity, genuineness and creditworthiness in respect of the share capital and share premium during the year.

5. The Assessing Officer also issued notice under section 133(6) of the Act dated 30.01.2015 to the Investor Companies. These notices were served on the Investor companies. In response to notice under section 133(6) of the Act, the Investor Companies had replied to the assessing officer with documentary

evidences which is recorded by the Assessing Officer in page no.5 of his assessment order, which is reproduced below:

**“Details of responses to notice u/s 133(6)**

*In the facts and circumstance of the case, notices u/s 133(6) were issued to the investors who had paid share application money to the assessee company towards share capital and share premium. Details of relating to service of notices u/s 133(6) and gist of responses from the said investors is depicted in the following table:*

<i>Name of Investor</i>	<i>Whether notice u/s 133(6) served or not</i>
<i>KUBER METALS PVT LTD</i>	<i>Served</i>
<i>ANUSHKA SOFT TEL PVT LTD</i>	<i>Served</i>

6. After verification and analysis of various facts available on record and various facts gathered during the course of enquiry proceedings, a show cause letter dated 20.03.2015 was issued to the assessee requiring it to explain various relevant facts why amounts of share capital and share premium should not be treated as unexplained cash credits and why the same should not be added back to the total income of assessee company for the assessment year 2012-13.

7. In response to the notice of the assessing officer, the assessee filed relevant documents, such as Bank statements, Balance Sheets, Profit and loss account, ROC details and confirmations etc, in respect of all the share subscribing companies. The assessee submitted before the assessing officer that by submitting these evidences, the assessee has proved three ingredients of section 68 namely, identity, creditworthiness and genuineness. The assessee company also argued that notices u/s 133(6) were issued to the share subscribing companies (investors) who had paid share application money to the assessee -company towards share capital and share premium and these notices were served upon them, (vide assessment order page no.5) therefore, identity of the subscribing companies (investors) cannot be doubted.

8. The assessing officer, after taking into account the assessee's submissions, as noted above, find some merits in the submissions of the assessee-company, therefore, he did not make addition in respect of share capital and share premium relating to share subscribing company, namely, M/s Kuber Metals Pvt Limited to the tune of Rs.1,99,99,500/-. However, for two share subscribing companies, namely: 1) M/s Anushka Soft-Tel Pvt, Limited and 2) M/s Sunny Wisdom Enterprises Inc, the assessing officer made addition to the tune of Rs.30,27,80,000/- (Rs.32,27,79,500- Rs.1,99,99,500).

9. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), who has deleted the addition made by the Assessing Officer. Aggrieved, the Revenue is in appeal before us.

10. Shri H. P. Meena, Learned Departmental Representative (Id. DR) for the Revenue argued a lot and also submitted written submissions before the Bench. The sum and substance of the written submission are that share subscribing companies were having meager income and not doing any business activity but only engaged in giving accommodation entries. The assessee had shown total receipt of Rs.30,27,80,000/- in the garb of share capital including share premium. Since, the transaction with the entity was not found to be genuine, therefore, the Assessing Officer made addition of Rs.30,27,80,000/- in A.Y.2012-13 under section 68 of the IT Act. From the perusal of the details/document filed by the assessee, it is clear that share subscribing Companies were not having any business activity. They were having meager income from which it is clear that they were paper/shell companies and engaged in giving accommodation entries to the beneficiaries in the garb of share capital including share premium. Just to submit before assessing officer PAN, Balance Sheet, Profit and loss account, Bank statements of share subscribing companies are not sufficient, the assessee has to prove credit worthiness/capacity of the share subscribing companies. Undisputedly, the onus of proving of credits in its books of accounts lies with the assessee and the settled position of law is that the

assessee is required to prove all the three criteria, that is identity, genuineness and creditworthiness. But in the instant case, the assessee company failed to discharge this onus. Thus, Assessing Officer was justified in adding share capital and share premium to assessee's taxable income as unexplained cash credit, therefore, addition made by the assessing officer may be upheld.

11. Shri Sapnesh Sheth, Learned Counsel for the assessee, begins by pointing out that assessee furnished before the assessing officer the copy of Balance Sheet, profit and loss account, final accounts, Copy of Income Tax return acknowledgement and bank statement for the relevant period evidencing the amount received from share applicants on account of Share capital and share premium through banking channel. In order to verify the identity of the share subscribing companies, the genuineness of transaction and the creditworthiness of the Companies, notice under section 133(6) were issued by assessing officer through registered post which were served on these share subscribing companies, therefore, identity of the subscribing companies should not be doubted. The Learned Counsel pleads that if share application money is received by assessee - company from alleged shareholders, whose names are given to Assessing Officer, then Department is free to proceed to reopen their individual assessments in accordance with law, but this amount of share money; cannot be regarded as '**undisclosed income**' under section 68 in the hands assessee - company. The Learned Counsel submits that it is very much evident from the balance sheet of M/s Anushka Soft-Tel Private Limited (ASTPL) that major source of its fund is from share capital and reserve funds, and surplus, which is Rs.19 crores. From the balance sheet of Anushka Soft-Tel Pvt. Limited it can be seen that it has been investing in Share Capitals of other companies and also advancing loans to other companies for interest or dividend (as noted by assessing officer in 1<sup>st</sup> para on page no. 23 of assessment order). These investments and loans have been realized and then invested in shares of assessee-company. Therefore, in case of M/s Anushka Soft-Tel Pvt. Limited, the

three ingredients of section 68, that is, identity, creditworthiness and genuineness have been fulfilled.

The learned Counsel submitted that assessee company has also proved identity; genuineness and creditworthiness in respect of amount received from M/s Sunny Wisdom Enterprise INC. In case of M/s Sunny Wisdom Enterprise INC, the amount has been received through proper foreign remittance channels, after following due procedure as evident by application FC-GPR submitted by the assessee to RBI and Part 'A' of Form no FC-GPR and declaration-cum-undertaking u/s 10 (5) of FEMA, letter to branch manager of Punjab National Bank and Kotak Mahindra and the letter of RBI dated 13.07.2012. The assessee company also submitted Balance Sheet, Profit and loss account, Bank statements, and other documents as required by the assessing officer. Learned Counsel further contends that assessing officer has himself decided not to make any addition under section 68 of the Act, in respect of M/s Kuber Metals Private Limited, one of the share applicant companies. Hence, there is a merit in assessee`s case. On appeal, Id CIT(A) deleted the addition in respect of two share applicant companies, that is, M/s Anushka Soft-Tel Private Limited and M/s Sunny Wisdom Enterprise INC. The Id Counsel defended the order passed by the Id CIT(A) and stated that Id CIT(A) has passed a reasoned and speaking order therefore such order should be upheld.

12. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. We note that assessee - company has received share capital and share premium money from the following three companies:

Name of Investor	Address of investor	No. of shares	Face value per share	Premium per share	Total face value	Total share premium	Total amount paid
Kuber Metals P Ltd	12/372 Talao Road, Apart SRT Rni Main Ankur	29850	10	660	2,98,500	1,97,01,000	1,99,99,500

Anushka Sort Tel P Ltd	105 Sagar Shopping Centre Andheri (W)	284000	10	660	28,40,000	18,74,40,000	19,02,80,000
Sunny Wisdom Enterprise INC	RM 51 5 <sup>th</sup> floor, Bandar Sheri Begawan BS 8811 Brunei Darussalam	250000	10	440	25,00,000	11,00,00,000	11,25,00,000

In respect of first share subscribing company, namely M/s Kuber Metals Private Ltd, the assessing officer did not make any addition of Rs.1,99,99,500/- under section 68 of the Act. In respect of two share subscribing companies, namely, Anushka Sort Tel Pvt Ltd and Sunny Wisdom Enterprise INC, the assessing officer made addition to the tune of Rs.30,27,80,000/- (Rs. 19,02,80,000 + Rs. 11,25,00,000). We note that assessing officer has called for details, heard the assessee and made addition u/s 68 of the Income Tax Act only for the amounts claimed to have received only from two companies i.e. (i) M/s Anushka Sort Tel Pvt Ltd and (ii) M/s Sunny Widsom Enterprise INC Barussalam. During the assessment stage, assessee submitted Profit and Loss account, Balance sheet, Bank statement, books of accounts, ROC records, PAN Number and other documents as were required by the assessing officer. The Assessing Officer issued notice u/s 133 (6) of the Act to the three investors; companies (referred supra) and as mentioned in page no. 11 of the assessment order, the notices were duly complied with by the above two investor companies, thereby filing replies. (vide page NO.5 and 11 of the assessment order). It is important to mention here that notices u/s 133(6) were issued only to (i) M/s Anushka Sort Tel Pvt Ltd (ASTPL) and (ii) M/s Kuber Metals P Ltd. However, we note that no notice was issued in case of Sunny Wisdom Enterprises. However, addition u/s 68 has been made in the case of M/s Anushka Soft-Tel Pvt. Limited and Sunny Wisdom Enterprise Inc. The notices u/s 133 (6) of the Act were served and they are also complied with. We note that directors of M/s Anushka Sort Tel Pvt Ltd, Shri Viral Gujjaar appeared before the Assessing Officer in response to summons u/s 131 of the Act and the Assessing Officer interrogated him and recorded a comprehensive statement. All these above facts were not disputed by Id DR for the Revenue.

13. We note that according to section 68 of the Income Tax Act, where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not satisfactory in the opinion of the assessing officer, the sum so credited may be charged to income tax as the income of the assessee of that assessment year. The assessing officer may consider such sum as cash credit due to lack of sufficient explanation. It is well known that provisions of section 68 have been introduced into the taxing enactments step by step in order to plug loopholes. Even long prior to the introduction of section 68 of the Act, in the statute book, courts had held that where any amounts were found credited in the books of the assessee in the previous year and the assessee offered no explanation about the nature and source thereof or the explanation offered was, in the opinion of the assessing officer, is not satisfactory, the sums so credited could be charged to income-tax as income of the assessee of the relevant assessment year. We note that with effect from assessment year 2013-14, section 68 of the Income Tax Act has been amended to provide that if a closely held company fails to explain the source of share capital, share premium or share application money received by it to the satisfaction of the assessing officer, the same shall be deemed to be the income of the company under section 68 of the Act. We note that the amended provisions of section 68, is not applicable to the assessee company under consideration, as the assessee's, assessment year is 2012-13. The Hon'ble Bombay High Court, in the case of *Gagandeep Infrastructure 80 Taxmann.Com 272 (Bom)*, held that amendment to section 68 is prospective and applicable only from assessment year 2013-14. With this background, now we shall proceed to examine in the assessee's case under consideration, whether assessee has discharged his onus to prove, prima facie, the identity, creditworthiness and genuineness of the share capital and share premium received by it from share subscribers companies namely Anushka Soft-Tel Pvt. Limited and Sunny Wisdom Enterprises Inc.

14.First, we shall examine, three ingredients of section 68 in the case of M/s Anushka Soft-Tel Pvt. Limited. We note that Id CIT(A) on perusal of the details, observed that M/s Anushka Soft-Tel Pvt. Limited was incorporated on 15<sup>th</sup> February 2008 as evident from copy of Certificate of Incorporation, etc. filed before the assessing officer. Before, Id CIT(A), assessee furnished a print out of a website of MCA, which shows that status of M/s Anushka Soft-Tel Pvt. Limited is 'active'. This indicates that M/s Anushka Soft-Tel Pvt. Limited has been filing all the statutory returns with the Registrar of Companies regularly and company is an active company. The Assessing Officer asked the director about the address of M/s Anushka Soft-Tel Pvt. Limited (question no. 21), wherein the director has stated that Registered Office of the company is changed on 30.04.2012 and that the form no. 8 has been filed with the ROC for change of address and the copy of the same is also provided. This reply of the director is not discussed by the assessing officer and no adverse inference drawn. M/s Anushka Soft-Tel Pvt. Limited has been filing income tax returns. The assessee has filed copy of income tax return of M/s Anushka Soft-Tel Pvt. Limited for assessment year 2012-13, alongwith Profit and loss account, Balance Sheet, copy of bank statements, ROC details and financial statements before the assessing officer and the same documents were filed before Id CIT(A). The above details have been filed both by the assessee as well as by M/s Anushka Soft-Tel Pvt. Limited in response to notice u/s 133(6) of the Act. In view of the above compliance by M/s Anushka Soft-Tel Pvt. Limited and also the appearance of Director before the assessing officer, no adverse conclusion regarding identity of the company M/s Anushka Soft-Tel Pvt. Limited can be made. Hence, we are of the view that assessee has proved the **identity** of share subscribing company, M/s Anushka Soft-Tel Pvt. Limited, therefore, we concur with the findings of Id CIT(A).

15.Regarding creditworthiness of M/s Anushka Soft-Tel Pvt. Limited, the Id CIT(A) observed that assessing officer discussed at page nos. 22 to 25 (assessment order) regarding the creditworthiness of M/s Anushka Soft-Tel Pvt. Limited on the basis of balance sheet and profit and loss account, and copy of

bank account furnished by it. On perusal of the discussion, the observation and conclusions of the Assessing Officer (at page 22 last para of assessment order) is reproduced as a sample:

*“It is seen from the balance sheet of the investor companies that their source of funds are from share capital, share premium and similar other investments founded on borrowed funds only. The said funds thus, generated are again invested in current investment and short- term loan and advances or both. The investor-companies are not found to have any tangible asset. ”*

(a)The Id CIT(A) noticed that above finding of the assessing officer is factually incorrect as the balance sheet, of M/s Anushka Soft-Tel Pvt. Limited shows that it has shareholders equity of above Rs.19crores and in the current year in which, there is a borrowings of about Rs.20 lacs. The Assessing Officer gives finding that they are invested in current investments and short term loans and advances, however, then gives a contrary finding that there are no tangible assets. As already stated, the addition is made regarding investment received from M/s Anushka Soft-Tel Pvt. Limited and M/s Sunny Widom Enterprises, but there is no discussion regarding M/s Sunny Wisdom Enterprises in this part of order. The assessing officer concludes that, M/s Anushka Soft-Tel Pvt. Limited does not have any business which is worthy of mention, but, goes on to give finding that the company is into investing the funds and in securities and Short Term Loans. This fact clearly shows that M/s Anushka Soft-Tel Pvt. Limited is into investment activity. Thus, it is not necessary for the company who is engaged in investment activity to have tangible assets in its Balance Sheet. This aspect was asked to the director of M/s Anushka Soft-Tel Pvt. Limited in question no.17 wherein he has explained as under:-

*“ANS: We have made investment in shares of above company in view of future potential by way of appreciation in value of shares. At present, there is no manufacturing activity. Initially, we had planned to do business of software developers and do outsourcing work of foreign companies, but the business could not take off due to non-availability of required software engineers and lack of outsourcing work due to policy of U S Government, which has emphasized to get the work done in their company only”.*

However, the assessing officer has not mentioned this part of statement anywhere in the assessment order. The right course is to mention it and rebut it by contrary finding or to discredit the statement by further interrogation.

(b) The Id CIT(A) observed that it is evident from the balance sheet of M/s Anushka Soft-Tel Pvt. Limited that the major source of its fund is from share capital and reserve funds, and surplus, which is Rs.19 crores. From balance sheet it was noted by Id CIT(A) that M/s Anushka Soft-Tel Pvt. Limited has been investing in Share Capitals of other companies and also advancing loans to other companies for interest or dividend (as found in 1<sup>st</sup> para on page no. 23 of assessment order). These investments and loans appear to have been realized and then invested in shares of assessee -company. The assessing officer in para 1 of page 24 states.....*"on close examination one can make out that their alleged investments are out of borrowed funds...."* But, it is seen from, balance sheet that, M/s Anushka Soft-Tel Pvt. Limited has Share Capital of Rs. 26.05 lacs, Reserves and Surplus of Rs. 18.86 crores and Short Term borrowings of Rs.21.89 lakhs. Hence, this statement of assessing officer is not correct.

(c) The Id CIT(A) observed that director of M/s Anushka Soft-Tel Pvt. Limited has in his reply to question no.25 and 26 explained the sources of funds and how the investments in assessee -company was made. The assessing officer has not questioned any further. There was no effort made to interrogate him, to bring out factual inconsistency, or to discredit the statement. There is no rebuttal by the assessing officer in assessment order. Another reason for the Id assessing officer to reject the creditworthiness of M/s Anushka Soft-Tel Pvt. Limited is that there is no basic infrastructure. It is not clear what the assessing officer means by basic infrastructure? The infrastructure of the company is created by it depending on its need. A small investment company may not require any office or staff, so, it does not make any commercial sense to create such infrastructure. This matter was also explained by the director of M/s Anushka Soft-Tel Pvt. Limited in his reply to question no. 23, wherein he stated that there is no manufacturing activity

and no infrastructure is needed. Like other parts of statement even this part is neither mentioned by the assessing officer nor rebutted.

(d) The assessing officer also rejects 'creditworthiness' of the company on the ground that there is no significant income. We do not agree with this logic of the assessing officer. As Id CIT(A) has rightly pointed out that investments need not always be made from the current year's income. Investments can be made from accumulated Capital or Savings and even from borrowed funds. It is also important to see that on examination of bank account the assessing officer noticed that there are no cash deposits in its bank account. The bank accounts shows that M/s Anushka Soft-Tel Pvt. Limited has received funds from another investee company and as soon as the amounts invested elsewhere in another investee company are realized the same are invested in the assessee's company.

The Id Counsel contended that the assessee - company has no obligation nor is it required to explain the "source" of M/s Anushka Soft-Tel Pvt. Limited as it tantamount to "source of source". The Id Counsel argued that, if the source of M/s Anushka Soft-Tel Pvt. Limited is found to be of doubtful nature, it can be examined in the assessment of M/s Anushka Soft-Tel Pvt. Limited and brought to tax, in its hands.

The Id Counsel pointed out that, there are no cash deposits and no significant borrowing by M/s Anushka Soft-Tel Pvt. Limited and there is no significant infusion of funds in M/s Anushka Soft-Tel Pvt. Limited in the current year except for short term borrowing of Rs.21.89 lacs. The Id Counsel also stated that, there is no linkage of hawala operations and M/s Anushka Soft-Tel Pvt. Limited is not part of any group of shell companies. He pointed out that this is a standalone company. He said that the directors are genuine and not name lender as evident from detailed answers given by him to question of Id assessing officer. Based on the above facts, Id CIT(A) held that there can be no adverse conclusions regarding creditworthiness of M/s Anushka Soft-Tel Pvt. Limited, hence we concur with the findings of Id CIT(A).

16.Regarding genuineness of M/s Anushka Soft-Tel Pvt. Limited, the Id CIT(A) observed that assessing officer has rejected the genuineness of the transactions on the following basis:

*“even if it were to be believed that the moneys in question belonged actually to the alleged investors, there is no reason, apparent or latent, as to why these investors were so mesmerized as to subscribe to the shares of the private limited assessee company, whose shares would fetch dividends and have no liquid tradability in the market, instead of parking their money with much safer and more rewarding financial avenues available in the market”.*

(a)The Id CIT(A) observed that the above reasoning is just an argument and cannot be accepted to reject the genuineness of transaction. The assessing officer ought to have collected all material evidence and then given, a factual finding. In this case, all the basic documents required to show the existence of a Company, assessment records, income tax details and bank accounts have been furnished and it is also seen that all the transactions are made through banking channel and properly reflected in the balance sheet. The share subscribing company, M/s Anushka Soft-Tel Pvt. Limited, in question, has complied to the notice u/s 133 (6) of the Act. Further, the director of the company appeared before the Id assessing officer u/s 131 and on examination, has confirmed and replied all the questions put forth by the assessing officer. Under the circumstances, the genuineness of transaction cannot be rejected only on such argument. It is seen that the assessee-company has a total turnover of more than Rs.200 crores and its returned income is Rs.5.53 crores, on the total share capital of Rs.1.32 crores. The director of M/s Anushka Soft-Tel Pvt. Limited in reply to question nos. 16 to 18 has explained the reason for paying the premium which is as under:

**ANSWER TO Q.NO.16 :-**

*“We have studied that this company is engaged in textile for a long period of time. Further, they: have good technical knowledge, management, goodwill, and we personally visited their Sivassa Factory. We also studied their future potential before investing in Geelon Industries P Ltd and also consulted my CA and relatives as explained in earlier reply.”*

**ANSWER To Q.NO 18:-**

*"As explained above, we have studied the working of above company and considering the volume of activity and market it possess, we thought it prudent to make investment in shares at a premium in above 'company. We have also seen the credit rating given to above company by JCRA. We analyzed their strategy and, product line which was very unique on this basis, we were of the opinion that the price of shares will increase."*

Therefore, Id CIT(A) has rightly observed that assessing officer has not further interrogated or countered him to discredit the said explanation. The assessing officer has not discussed this part of statement anywhere in his assessment order. It is also evident from the answers of the directors of M/s Anushka Soft-Tel Pvt. Limited that he is having very good knowledge of the business activity of the assessee-company and he has taken considered decision of investing in the assessee-company.

(b) The Id CIT(A) observed that a Valuation Report of a professional was submitted in support of premium charged. There is no discussion by the assessing officer as to why the same is not acceptable. There is no rejection or rebuttal of the said Valuation Report. In the statement, (question no. 10- 16), the director of M/s Anushka Soft-Tel Pvt. Limited has given replies to assessing officer on questions of minute details, on how he got to know of assessee - company, who was contact person, physical appearance of director of assessee - company and how decision to invest in assessee - company was made, etc. This goes on show that the director of M/s Anushka Soft-Tel Pvt. Limited had full knowledge and was fully involved in the said transactions of investment in assessee-company.

In view of above facts, and also since there are no cash deposits and no involvement of entry operators, the Id CIT(A) held that there is no merit in the conclusions drawn by the Assessing Officer with regard to lack of genuineness. Therefore, assessee-company has proved the genuineness of the Transaction, hence we concur with the decision of Id CIT(A).

17. (a) Regarding Investment of M/s Sunny Wisdom Enterprise INC ('in short SWEI'), the Id CIT(A) observed that assessee company has received a sum of Rs 11.25 crores from M/s Sunny Wisdom Enterprise INC ('in short SWEI). In this case too, basic details were filed before the assessing officer, as evident from the reply of the assessee filed on 26.03.2015. The assessee company SWEI is incorporated in Brunei Darussalam country. The assessing officer has not issued any notice or made any reference for further investigation to FT & TR, CBDT, New Delhi. The assessing officer made discussions in page no. 21, 22, and 25 of assessment order in respect of identity, creditworthiness and genuineness of only M/s Anushka Soft-Tel Pvt. Limited. About M/s Sunny Wisdom Enterprise INC, the assessing officer does not discuss the identity, creditworthiness and genuineness. It is not clear why the documents and details were not examined and conclusions were not drawn, when they were available before the Id Assessing Officer? Therefore, assessing officer has not given any reason as to why he is rejecting the identity; creditworthiness and genuineness of M/s Sunny Wisdom Enterprise INC.

(b) From the details filed, it is clear that amount has been received through proper foreign remittance channels, after following due procedure as evident by application FC - GPR submitted by the assessee to RBI and Part 'A' of Form no FC - GPR and declaration-cum-undertaking u/s 10 (5) of FEMA, letter to branch manager of Punjab National Bank and Kotak Mahindra and the letter of RBI dated 13.07.2012. It is also observed from the Income and Expenditure Account and the Balance Sheet (forming part of paper book (page Nos 121 to 125) that SWEI has operating revenues (turnover) of 82,34,593 USD and net income of is at 6,33,128 USD. This shows that the SWEI is not a dummy company as it has significant operating revenues.

(c) From the balance sheet (PB 122), it can be seen that SWEI has total shareholders equity of 38,69,938 .99 USD. A copy of the ledger account, income tax return of SWEI INC has also been filed (paper book page no. 1230) as per which, the total investment in assessee -company is shown at Rs.25,00,000 USD

which appears in the balance sheet Under the head Funds and Long Term Investment. From these documents, prima facie (i) identity, (ii) creditworthiness (iii) and genuineness of transactions are established by the assessee. The assessing officer has not made any investigation, nor issued any reference to FT & TR or made any adverse finding, in respect of any of these issues. It can be seen that the transactions have been directly made between SWEI and the assessee company, through banking-channels and not through any hawala transaction, or intermediaries. Based on this factual position, the Id CIT(A) has rightly held that (i) identity, (ii) creditworthiness (iii) and genuineness of transactions with SWEI have been proved by the assessee company. We concur the above findings of Id CIT(A).

18. We note that Hon'ble Bombay High Court in Income Tax Appeal No.1613 of 2014 in the case of Commissioner of Income Tax-1 vs. M/s. Gagandeep Infrastructure Pvt. Ltd, dated 20<sup>th</sup> March, 2017, held that amended provisions of section 68, is not applicable for assessment year is 2012-13. The findings of the Hon'ble Court is reproduced below:

*“(e) We find that the proviso to Section 68 of the Act has been introduced by the Finance Act 2012 with effect from 1<sup>st</sup> April, 2013. Thus it would be effective only from the Assessment Year 2013-14 onwards and not for the subject Assessment Year. In fact, before the Tribunal, it was not even the case of the revenue that section 68 of the Act as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1<sup>st</sup> April, 2013 was its normal meaning. The Parliament did not introduce to proviso to section 68 of the Act with retrospective effect nor does the proviso so introduced states that it was introduced ‘for removal of doubts’ or that it is ‘declaratory’. Therefore, it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to section 68 of the Act is immaterial and does not change the interpretation of section 68 of the Act both before and after the adding of the proviso. In any view of the matter the three essential tests while confirming the pre-proviso section 68 of the Act laid down by the Courts namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on facts it was found satisfied. Further it was a submission on behalf of the revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) if the shareholders i.e. they are bogus. The Apex Court in Lovely Exports (P) Ltd. (supra) in the context to the pre-amended section 68 of the Act has held that where the revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income Tax Officer to proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It does not entitle the revenue to add the same to the assessee’s income as unexplained cash credit.”*

19. From the above judgment of the Hon'ble Bombay High Court in the case of M/s. Gagandeep Infrastructure Pvt. Ltd (supra), it is vivid that proviso to section 68 of the Act which has been introduced by the Finance Act 2012 with effect from 1<sup>st</sup> April, 2013, is effective only from the Assessment Year 2013-14. That is, the amendment is prospective in nature, **hence such amendment is not applicable to the assessee under consideration, as in the assessee's case the assessment year involved is "Assessment Year 2012-13", therefore assessee need not to prove source of the source.** However, from the facts narrated above, it is abundantly clear that assessee under consideration has proved "source of the source" also.

20. We note that during the assessment stage, assessee submitted Profit and Loss account, Balance sheet, Bank statement, books of accounts, ROC records, PAN Number and other documents as were required by the assessing officer. It was the duty of Assessing Officer that he should enquire from the Assessing Officer of the share subscribing company, which he has failed to do so. For that reliance can be placed on the judgment of Kolkata High Court in the case of Commissioner of Income Tax, Kolkata-III vs. M/s. Dataware Private Limited in GA No.2856 of 2011 wherein it was held as under:

*"....the Assessing Officer of the assessee cannot take the burden of assessing the profit and loss account of the creditor when admittedly the creditor himself is an income tax assessee. After getting the PAN number and getting the information that the creditor is assessed under the Act, the Assessing Officer should enquire from the Assessing Officer of the creditor as to the genuineness of the transaction and whether such transaction has been accepted by the Assessing Officer of the creditor but instead of adopting such course, the Assessing Officer himself could not enter into the return of the creditor and brand the same as unworthy of credence."*

21. We note that Hon'ble Jurisdictional High Court in the case of Ranchhod Jivabhai Nakhava, [2012] 21 taxmann.com 159 (Guj) held the same ratio on the identical and similar facts. The findings of the Hon'ble Court is reproduced below:

*“15. In our view, once the assessee has established that he has taken money by way of accounts payee cheques from the lenders who are all income tax assesseees whose PAN have been disclosed, the initial burden under Section 68 of the Act was discharged. It further appears that the assessee had also produced confirmation letters given by those lenders.*

*16. Once the Assessing Officer gets hold of the PAN of the lenders, it was his duty to ascertain from the Assessing Officer of those lenders, whether in their respective return they had shown existence of such amount of money and had further shown that those amount of money had been lent to the assessee. If before verifying of such fact from the Assessing Officer of the lenders of the assessee, the Assessing Officer decides to examine the lenders and asks the assessee to further prove the genuineness and creditworthiness of the transaction, in our opinion, the Assessing Officer did not follow the principle laid down under Section 68 of the Income Tax Act.*

*17. If on verification, it was found that those lenders did not disclose in their income tax return the transaction or that they had not disclosed the aforesaid amount, the Assessing Officer could call for further explanation from the assessee to prove the genuineness of the transaction or creditworthiness of the same. However, without verifying such fact from the income tax return of the creditors, the action taken by the Assessing Officer in examining the lenders of the assessee was a wrong approach. Moreover, we find that those lenders have made inconsistent statement as pointed out by the Commissioner of Income Tax (Appeals) and in such circumstances, we find that both the Commissioner of Income Tax (Appeals) and the Tribunal were justified in setting aside the deletion as the Assessing Officer, without taking step for verification of the Income Tax Return of the creditors, took unnecessary step of further examining those creditors. If the Assessing Officers of those creditors are satisfied with the explanation given by the creditors as regards those transactions, the Assessing Officer in question has no justification to disbelieve the transactions reflected in the account of the creditors. In other words, the Assessing Officer had no authority to dispute the correctness of assessments of the creditors of the assessee when a co-ordinate Assessing Officer is satisfied with the transaction.*

*18. We, thus, find that in the case before us the Tribunal below rightly set-aside the deletion made by the Assessing Officer, based on erroneous approach by wrongly shifting the burden again upon the assessee without verifying the Income Tax return of the creditors. The position, however, would have been different if those creditors were not income tax assesseees or if they had not disclosed those transactions in their income tax returns or if such returns were not accepted by their Assessing Officers.*

*19. No substantial question of law is, thus, involved. We find no merit in this Appeal and the same is dismissed.”*

22.Hon`ble Jurisdictional High Court in the case of Ujala Dyeing And Printing Mills P. Ltd, Tax Appeal No. 375 Of 2008, held as follows:

*“9. We have considered the submissions made by the learned standing counsel for the Revenue and we have also perused the orders passed by the authorities.*

*10. It is pertinent to note that right from the assessment stage, all relevant details were furnished by the Assessee in pursuance of the inquiry conducted by the Assessing Officer with regard to cash credit of Rs. 50 lakhs. The Assessing Officer had inquired*

*about the share application money and the following documents were submitted during the course of assessment proceedings:*

- (i) Confirmation of all five share applicant-companies;*
- (ii) Permanent Account Number (PAN);*
- (iii) Resolution passed by all the five applicants for investment in M/s. Ujala Dyeing and Printing Mills Pvt. Ltd.*
- (iv) Details of D. D. through which amounts were invested;*
- (v) Acknowledgment of return of income held by all the five share applicant-companies for the assessment year 2002-03;*
- (vi) Duly audited balance-sheet of all the five share applicant-companies for the financial year 2001-02 along with the audit report.*

*11. On making independent inquiry by the Assessing Officer by issuing notice under Section 133(6) to all the five share applicant-companies, the following further details were supplied by them;*

- (a) Covering letter in reply to the said notice by speed post;*
- (b) Explanation of the sources from which investments were made by the respective companies;*
- (c) Copy of the bank statement showing the aforesaid transaction.*

*12. The following facts are apparent on record to establish the creditworthiness of the share applicant-companies:*

- (i) All the applicant-companies are 9 to 10 years old companies as can be verified from the date of incorporation written on the return of income;*
- (ii) All the share applicant-companies are having authorized and paid up share capital ranging from 50 lakhs to 65 lakhs;*
- (iii) All the share applicant companies are non-banking finance companies registered with the Reserve Bank of India to carry on the business of non-banking financial institution;*
- (iv) All the companies have substantial investments ranging from Rs. 65.10 lakhs to Rs. 96.16 lakhs in other companies;*
- (v) Annexures of investment shows the name of M/s. Ujala Dyeing and Printing Mills Pvt. Ltd. in whose share capital those companies have made investment;*
- (vi) All the applicant-companies are assessed to tax and assessment order has been received by them for the relevant assessment year 2002-03.*

*13. On the basis of the aforesaid details, the Assessing Officer has accepted the proof of identity of the companies, which had made share application in the Assessee-company. The Assessing Officer has also accepted that all the companies were having regular bank accounts from which DDs for share application money were issued. However, the Assessing Officer has not found the creditworthiness of the five companies and on that*

count, additions were made. Even while appreciating the evidence, the learned Commissioner of Income Tax (Appeals) has observed in his order that the Assessing Officer has made intensive inquiry to unearth the Assessee's own money coming in the form of share application money from such companies which do not have source. He has further observed that the three ingredients, namely: (1) identity of the creditor; (2) his creditworthiness; and (3) genuineness of the transactions, are not fulfilled. He had, therefore, confirmed the additions made by the Assessing Officer. On these very materials, the Tribunal has come to a finding that the Assessee has clearly discharged its onus of proving identity of parties, genuineness of transaction and creditworthiness of share applications inasmuch as evidently their returns of income, assessment orders, balance-sheets showing investment, explanation regarding how they raised funds have been submitted before the lower authorities. The Tribunal has also found that the adverse inference drawn by the Assessing Officer is misplaced as their expectations from the Assessee travelled beyond the ingredients of onus as prescribed by Section 68 of the Act. After giving this factual finding, the Tribunal has referred to the decision of this Court in the case of *CIT v. Pragati Co-operative Bank Ltd.* : (2005) 278 ITR 170 and held that the Assessing Officer has gone beyond the same on assumption and also observed that though all assessments were finalized, the Assessing Officer has doubted certain sale of shares made by these parties.

14. From the aforesaid facts, we are of the view that the Tribunal has considered each and every finding recorded by the Assessing Officer as well as the Commissioner of Income Tax (Appeals), Ahmedabad and it cannot be said that the points raised before the Assessing Officer as well as the first appellate authority were not dealt with by the Tribunal. Hence, reliance placed on the decision of this Court in the case of *Rameshchandra M. Luthra* : (2002) 257 ITR 460 by the learned standing counsel for the Revenue is uncalled for. Since the Tribunal has recorded findings of fact and after appreciation of the evidence has come to the correct conclusion, we are of the view that no substantial question of law arises out of the order of the Tribunal. We, therefore, dismiss the appeal.”

23. The main plank on which the assessing officer made the addition was because the directors of the share subscribers did not turn up before him. However, we note that director of M/s Anushka Soft-Tel Pvt. Limited, one of the share subscribing companies, appeared before assessing officer and assessing officer took statement under section 131 of the Act. Therefore, stand taken by the assessing officer is not correct. We also note that notice issued by the assessing officer under section 133(6) of the Act was served on M/s Anushka Soft-Tel Pvt. Limited and this share subscribing company made the compliance. Besides, M/s Anushka Soft-Tel Pvt. Limited, had submitted Profit and Loss account, Balance sheet, Bank statement, books of accounts, ROC records, PAN Number and other documents, as required by the assessing officer. Likewise, M/s Sunny Wisdom

Enterprise INC, also had submitted Profit and Loss account, Balance sheet, Bank statement, and other documents, as were required by the assessing officer. In such a case the Hon'ble Apex Court in the case of Orissa Corpn. (P) Ltd. (supra) 159 ITR 78 and the Hon'ble Gujarat High Court, in the case of Dy. CIT v. Rohini Builders [2002] 256 ITR 360 / [2003] 127 Taxman 523, has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. Relevant observations at pages 369 and 370 of this report are reproduced hereunder:-

*"Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non-compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69.*

24. In the case of Nemi Chand Kothari 136 Taxman 213, the Hon'ble Guahati High Court has thrown light on another aspect touching the issue of *onus* on assessee under section 68, by holding that the same should be decided by taking into consideration the provision of section 106 of the

Evidence Act which says that a person can be required to prove only such facts which are in his knowledge. The Hon'ble Court in the said case held that, once it is found that an assessee has actually taken money from depositor/lender who has been fully identified, the assessee/borrower cannot be called upon to explain, much less prove the affairs of such third party, which he is not even supposed to know or about which he cannot be held to be accredited with any knowledge. In this view, the Hon'ble Court has laid down that section 68 of Income-tax Act, should be read along with section 106 of Evidence Act. The relevant observations at page 260 to 262, 264 and 265 of the report are reproduced herein below:-

*"While interpreting the meaning and scope of section 68, one has to bear in mind that normally, interpretation of a statute shall be general, in nature, subject only to such exceptions as may be logically permitted by the statute itself or by some other law connected therewith or relevant thereto. Keeping in view these fundamentals of interpretation of statutes, when we read carefully the provisions of section 68, we notice nothing in section 68 to show that the scope of the inquiry under section 68 by the Revenue Department shall remain confined to the transactions, which have taken place between the assessee and the creditor nor does the wording of section 68 indicate that section 68 does not authorize the Revenue Department to make inquiry into the source(s) of the credit and/or sub-creditor. The language employed by section 68 cannot be read to impose such limitations on the powers of the Assessing Officer. The logical conclusion, therefore, has to be, and we hold that an inquiry under section 68 need not necessarily be kept confined by the Assessing Officer within the transactions, which took place between the assessee and his creditor, but that the same may be extended to the transactions, which have taken place between the creditor and his sub-creditor. Thus, while the Assessing Officer is under section 68, free to look into the source(s) of the creditor and/or of the sub-creditor, the burden on the assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act which reads as follows:*

*"Burden of proving fact especially within knowledge.-When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. "*

\*\*\*\*\*

*What, thus, transpires from the above discussion is that while section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section*

68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s) of the creditor but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. In other words, while section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money, section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit and it is not the burden of the assessee to prove the creditworthiness of the source(s) of the sub-creditors. If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 are to stand together, which they must, then the interpretation of section 68 has to be in such a way that it does not make section 106 redundant. Hence, the harmonious construction of section 106 of the Evidence Act and section 68 of the Income- tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor, the burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been. eventually, received by the assessee. It, therefore, further logically follows that the creditor's creditworthiness has to be Judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the assessee. "

\*\*\*\*\*

" ... If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. In other words, the genuineness as well as the creditworthiness of a creditor have to be adjudged vis-a-vis the transactions, which he has with the assessee. The reason why we have formed the opinion that it is not the business of the assessee to find out the actual source or sources

*from where the creditor has accumulated the amount, which he advances, as loan, to the assessee is that so far as an assessee is concerned, he has to prove the genuineness of the transaction and the creditworthiness of the creditor vis-a-vis the transactions which had taken place between the assessee and the creditor and not between the creditor and the sub-creditors, for, it is not even required under the law for the assessee to try to find out as to what sources from where the creditor had received the amount, his special knowledge under section 106 of the Evidence Act may very well remain confined only to the transactions, which he had' with the creditor and he may not know what transaction(s) had taken place between his creditor and the sub-creditor... "*

\*\*\*\*\*

*"In other words, though under section 68 an Assessing Officer is free to show, with the help of the inquiry conducted by him into the transactions, which have taken place between the creditor and the sub-creditor, that the transaction between the two were not genuine and that the sub-creditor had no creditworthiness, it will not necessarily mean that the loan advanced by the sub-creditor to the creditor was income of the assessee from undisclosed source unless there is evidence, direct or circumstantial, to show that the amount which has been advanced by the sub-creditor to the creditor, had actually been received by the sub-creditor from the assessee ...."*

\*\*\*\*\*

*"Keeping in view the above position of law, when we turn to the factual matrix of the present case, we find that so far as the appellant is concerned, he has established the identity of the creditors, namely, Nemichand Nahata and Sons (HUF) and Pawan Kumar Agarwalla. The appellant had also shown, in accordance with the burden, which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors aforementioned. In fact the fact that the assessee had received the said amounts by way of cheques was not in dispute. Once the assessee had established that he had received the said amounts from the creditors aforementioned by way of cheques, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter the burden had shifted to the Assessing Officer to prove the contrary. On mere failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, such failure, as a corollary, could not have been and ought not to have been, under the law, treated as the income from the undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. Viewed from this*

*angle, we have no hesitation in holding that in the case at hand, the Assessing Officer had failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. In the absence of any such evidence on record, the Assessing Officer could not have treated the said amounts as income derived by the appellant from undisclosed sources. The learned Tribunal seriously fell into error in treating the said amounts as income derived by the appellant from undisclosed sources merely on the failure of the sub-creditors to prove their creditworthiness."*

25. Further, in the case of CIT v. S. Kamaljeet Singh [2005] 147 Taxman 18(All.) their lordships, on the issue of discharge of assessee's onus in relation to a cash credit appearing in his books of account, has observed and held as under:-

*"4. The Tribunal has recorded a finding that the assessee has discharged the onus which was on him to explain the nature and source of cash credit in question. The assessee discharged the onus by placing (i) confirmation letters of the cash creditors; (ii) their affidavits; (iii) their full addresses and GIR numbers and permanent account numbers. It has found that the assessee's burden stood discharged and so, no addition to his total income on account of cash credit was called for. In view of this finding, we find that the Tribunal was right in reversing the order of the AA C, setting aside the assessment order."*

26. We also take note of the decision of the Hon'ble High Court, Calcutta in the case of S.K. Bothra & Sons, HUF v. Income-tax Officer, Ward- 46(3), Kolkata 347 ITR 347 wherein the Court held as follows:

*"15. It is now a settled law that while considering the question whether the alleged loan taken by the assessee was a genuine transaction, the initial onus is always upon the assessee and if no explanation is given or the explanation given by the appellant is not satisfactory, the Assessing Officer can disbelieve the alleged transaction of loan. But the law is equally settled that if the initial burden is discharged by the assessee by producing sufficient materials in support of the loan transaction, the onus shifts upon the Assessing Officer and after verification, he can call for further explanation from the assessee and in the process, the onus may again shift from the Assessing Officer to assessee."*

*16. In the case before us, the appellant by producing the loan-confirmation-certificates signed by the creditors, disclosing their permanent account numbers and address and further indicating that the loan was taken by account payee cheques, no doubt, prima facie, discharged the initial burden and those materials disclosed by the assessee prompted the Assessing Officer to enquire through the Inspector to verify the statements."*

27. In a case where the issue was whether the assessee availed cash credit as against future sale of product, the AO issued summons to the creditors who did not turn up before him, so AO disbelieved the existence of creditors and saddled the addition, which was overturned by Ld. CIT(A). However, the Tribunal reversed the decision of the Ld. CIT(A) and upheld the AO's decision, which action of Tribunal was challenged before the Hon'ble High Court, Calcutta in the case of Crystal Networks (P.) Ltd. v. Commissioner of Income-tax 353 ITR 171 wherein the Tribunal's decision was overturned and decision of Ld. CIT(A) upheld and the Hon'ble High Court has held that when the basic evidences are on record the mere failure of the creditor to appear cannot be basis to make addition. The court held as follows:

*8. Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that Income-tax Officer did not consider the material evidence showing the creditworthiness and also other documents, viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidis. These evidence were duly considered by the Commissioner of Income-tax (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when the material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the Income-tax Officer. He further contended that when the Tribunal has relied on the entire judgment of the Commissioner of Income-tax (Appeals), therefore, it was not proper to take up some portion of the judgment of the Commissioner of Income-tax (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the Commissioner of Income-tax (Appeals).*

*9. In this connection he has drawn our attention to a decision of the Supreme Court in the case of Udhavdas Kewalram v. CIT [1967] 66 ITR 462. In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must In deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.*

*10. We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore, it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter the creditworthiness. As rightly pointed out by the learned counsel that the Commissioner of Income-tax (Appeals) has taken the trouble of examining of all other materials and documents, viz., confirmatory*

*statements, invoices, challans and vouchers showing supply of bidis as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued, in our view, is not important. The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. When it was found by the Commissioner of Income-tax (Appeals) on facts having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this -fact finding. Indeed the Tribunal did not really touch the aforesaid fact finding of the Commissioner of Income-tax (Appeals) as rightly pointed out by the learned counsel. The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 464, the Supreme Court has observed as follows:*

*"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act; it is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. "*

*11. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.*

*12. Taking inspiration from the Supreme Court observations we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the Commissioner of Income-tax (Appeals). We also found no single word has been spared to up set the fact finding of the Commissioner of Income-tax (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.*

*13. Hence, the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside. We restore the judgment and order of the Commissioner of Income-tax (Appeals). The appeal is allowed.*

28.The Hon'ble jurisdictional ITAT in the case of Pankaj Enka v/s DCIT in ITA No.816/Ahd/2013 has held that:

*" the assessee has discharged the primary onus to prove as genuine share application money. On perusal of bank statement, no cash has been deposited by them before issue of cheque to the assessee towards share application money. If the assessing officer doubts the source of source, he was free to conduct inquiry in the case of person from whom assessee has received funds" .*

The Hon'ble' jurisdictional High Court has concurred with this view of Hon'ble ITAT in ITA No. 967/2015 dated 05.01.2016 .

29. On the identical facts, in Tax appeal no.442 of 2011 of Hon'ble' Gujarat High Court in the case of CIT v/s Belgium Glass & Ceramics P Ltd (date of pronouncement 13.06.2012), held as follows:

*"4. On consideration of facts and the order of the Tribunal, it is seen that while reversing the order of the Commissioner (Appeals) the Tribunal took view that once the applicants admit to have made the payment of share application money, no further inquiry was necessary into the creditworthiness and genuineness of the transactions in the case of assessee - company. It took such view on the basis of various judicial pronouncements of the High Courts in which, the issue of share application money was considered and mainly relied on the decision of the Apex Court in CIT v/s Lovely Exports P Ltd (2010 ) 14 SSC 761)*

*4.1 In the facts of the case, it is not disputed that the assessee had furnished the assessing officer the names of 15 persons from whom the share application money was receive. The assessee had also produced in respect of each of them the copies of revenue records in form no. 7/12 extracts showing that they were holders of agricultural land. In Lovely Exports (supra), the Supreme Court considered the issue of share application money regarded as undisclosed income u/s 68 of the Act and observed that if share application money was received by assessee - company, from the alleged bogus share holders, whose names were given to assessing officer then the Department was free to proceed to reopen the individual assessments in accordance with Law."*

30. On identical facts, the Hon'ble jurisdictional High Court in the case of Associated Transrail Structure Ltd. vs. ACIT 397 ITR 573 (Guj), held as follows:

*"9. Thus, from the facts emerging on record, it is apparent that during the period immediately after its incorporation the assessee-company had practically done no business so as to generate income of Rs.50 lakhs. The Assessing Officer on inquiry has found many of the alleged shareholders to be benamidars or having not invested the money, but at the same time, he has traced out the source of money to some specific persons, who were the real investors. The Supreme Court has in the case of CIT v. Lovely Exports (P).Ltd., (supra), held that if the share application money is received by the assessee-company from the alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen the individual assessment in accordance with law. Such amounts cannot be regarded as undisclosed income under section 68 of the Act. Applying the said*

*principles to the facts of the present case, the Assessing Officer having traced out the source of funds to specific persons who had invested the same in share of the assessee-company, it was open for the Assessing Officer to proceed against the said persons. The funds not having emanated from the assessee-company, there was no warrant for making addition of the said amount as undisclosed income under section 68 of the Act in its hands. In the circumstances, the Tribunal was justified in deleting the addition of Rs.50,00,000 made under section 68 of the Act. The question stands answered accordingly, that is, in favour of the assessee and against the Revenue.”*

31.The Hon'ble jurisdictional High Court of Gujarat in many cases held that once the basic document such as, confirmation, copy of bank account, copy of share application and copy of income tax returns of the creditors, or share applicants have been furnished by the assessee, the onus of proving the above three elements required for section 68 is discharged. It is also held that it is not for the assessee to prove or to explain the "**source**" of the share applicant or loan creditor. It is also held that if there is any doubt regarding source of the said creditors / share applicants, the matter can be examined by the concerned assessing officer in their own assessment. For this, reliance can be placed on the judgment of the Hon`ble Gujarat High Court in the case of Hindustan Inks & Resins Ltd v/s DCIT, 60 DTR 0018 (Guj).The same legal ratio is also followed in following binding decisions of Hon'ble' jurisdictional High Court of Gujarat:

(i) CIT v/s Himatsu Blmet Ltd (High Court of Gujarat no. 546 of 2009 Order dt 04.05.2010 in Tax Appeal

(ii) CIT v/s Bhavana Property Developers P ltd (High Court of Gujarat) in ITA No. 1039/2009

(iii) CIT v/s M/s Goyal Synthetics P Ltd (High Court of Gujarat) (in ITA No. 498 of 2010) are all of exact issue of share application money received.

(iv) CIT v/s Shree Rama Multi Tech Ltd reported in (2013) 34 Taxmann. Com 177 (Gujarat)

(v) The CIT v/s Guptex P Ltd in TA No. 109/2010 dt 14.09.2011

(vi) CIT v/s Nilchem Capital Ltd in T A No. 2087/ 2009 with 2088/2009 dt 14. 11. 2011

(vii) CIT v/s V Satyendra Traders P Ltd in T A No 692/ 2010 dt 04. 10. 2011

(viii) CIT v/s Maruti Aluminium P Ltd in T A No. 330/2011 dt 27. 06. 2012

(ix) CIT v/s Gay Lord Industries Ltd in TA No. 1426/2011 dt 27.06.2012

### 32.Conclusion

At the cost of repetition we state that assessee-company has received share application money from three companies, viz: (i) M/s Kuber Metals Pvt Ltd (In short KMPL ), (ii) M/s M/s Anushka Soft-Tel Pvt. Limited(ASPL) and (iii)M/s Sunny Wisdom Enterprise INCOME (SWEI). The assessing officer has made addition u/s68 of the amount received only from M/s Anushka Soft-Tel Pvt. Limited and M/s Sunny Wisdom Enterprise INC (SWEI). The assessee filed before the assessing officer, the details and documents called for. The assessing officer also issued notices u/s 133 (6) of the Act, which were complied with, and also the director of M/s Anushka Soft-Tel Pvt. Limited appeared in response to notice u/s 131 of the Act. The details filed by the assessee as well as by M/s Anushka Soft-Tel Pvt. Limited, comprises of confirmations, copy of share application, copy of tax returns, copy of Certificate of Incorporation, copy of bank accounts , copy of bank statements of M/s Anushka Soft-Tel Pvt. Limited, copy of Profit and Loss and Balance Sheet. The investment in the assessee-company by M/s Anushka Soft-Tel Pvt. Limited is mainly out of its share capital itself, which is available in its balance sheet, since its incorporation, 2008. No substantial additional funds have been received by M/s Anushka Soft-Tel Pvt. Limited during the year under consideration. There is no cash deposit found in the bank account of M/s Anushka Soft-Tel Pvt. Limited, during this period, of making investment in the assessee-company. There is no finding of involvement of any entry provider or hawala operator. M/s Anushka Soft-Tel Pvt. Limited is not found to be-part of any group of Companies floated by any entry provider. A detailed interrogation was conducted by the assessing officer and the director of M/s Anushka Soft-Tel Pvt. Limited has answered all the questions, which show that the director is having full knowledge of operations of M/s Anushka Soft-Tel Pvt. Limited as well as the assessee-company. The director is not a name lender as generally happens in the case of dummy companies and Shell Company. The statement of the director has not been rebutted or discredited by the assessing officer. The assessee company is having a turnover of Rs.200

crores and the Share Capital of the company is Rs 1.32 crores. Hence, the premium is charged by the assessee- company. In the case of M/s SWEI Inc, the details and documents have been filed before the Id assessing officer however, the assessing officer has not examined and / or rebutted them with any cogent or discernible line of reasoning. The assessing officer has not made reference to FT & TR nor has he made any investigation / inquiry, in this case. The documents filed reflect that SWEI Inc, is a Company having substantial operating revenues and it has enough shareholders equity to make investment in assessee-company. Further, the documents also show that the investment has been made through a proper channel of foreign remittances and by following due procedure under FC-GPR. The same is also reflected in the balance sheet of M/s SWEI Inc. The assessing officer has not given any contrary finding on any of the documents / details filed. The assessing officer has made addition only in respect of two companies. The assessee has filed basic relevant documents at assessment stage and wherever the Assessing Officer has issued notices, they are complied with and investigations/ examination of director has not thrown up any contrary fact.

33. The law regarding addition u/s 68 on account of the share application money has been laid out by the Hon'ble Supreme Court in the case of CIT v/s Lovely Exports ( 2008) 216 ITR 195 ( SC) wherein it has held that;

*"if share application money is received by assessee - company from alleged bogus shareholders, whose names are given to Assessing Officer, then Department is free to proceed to reopen their individual assessments in accordance with law, but this amount of share money; cannot be regarded as ' undisclosed income ' under section 68 of assessee -company."*

34. We note that all the share applicants are (i) income tax assessee's, (ii) they are filing their return of income, (iii) the share application form and allotment letter is available on record, (iv) the share application money was made by account payee cheques, (v) the details of the bank accounts belonging to the share applicants and their bank statements, (vi) in none of the transactions the assessing officer found deposit in cash before issuing cheques to the assessee company, (vii) the applicants are having substantial creditworthiness which is represented by a capital and reserve as noted above.

The Hon'ble High Court of Delhi in the case of CIT v/s. Steller Investment Ltd 192 ITR 287 has held that;

*“If it be assumed that the subscribers to the increased share capital were not genuine, even then under no circumstances could the amount of share capital be regarded as undisclosed income of the assessee. It may be there were some bogus shareholders and the money may have been provided by some other persons. It would have been more sensible to re-open the assessments of the person alleged to have advanced the money. How this amount of increased share capital could be assessed in the hands of the company itself was beyond understanding.”*

The Hon'ble Supreme Court has agreed with this view, in above case and dismissed the SLP of Revenue in CIT v/s Stellar Investment Ltd in 251 ITR 263 (SC).

35. Based on the above facts and precedents applicable to these facts, as narrated above, we are not inclined to accept the contention of the Assessing Officer in any manner and hence the addition so made by assessing officer has been rightly deleted by Id CIT(A) by passing a reasoned and speaking order. That being so, we decline to interfere with the order of Id. CIT(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

36. In the result, appeal of the Revenue is dismissed.

Order is pronounced on 25/01/2022 by placing result on notice board.

Sd/-

**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

सूरत /Surat/ दिनांक/ Date: 25/01/2022

SAMANTA

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-

**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat